Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

KENNETH D. HENEGAR,

Petitioner,

v.

WILLIAM M. BANTA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Sixth Circuit Court of Appeals' opinion, decided and filed June 21, 1994, is in direct conflict with this Court's *Hawaiian Airlines, Inc. v. Finazzo* opinion, decided June 20, 1994?

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OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit is reported at *Henegar v. Banta*, No. 93-3315, 1994 WL 266751 (6th Cir. 1994), and reprinted as Appendix A. The opinion was recommended for full-text publication pursuant to Sixth Circuit Rule 24. The opinion affirms the judgment of the United States District Court for the Northern District of Ohio. The District Court's Order granting Respondent's Motion for Summary Judgment is reported at *Henegar v. Banta*, 817 F. Supp. 668 (N.D. Ohio 1993) and reprinted as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was decided and filed on June 21, 1994. This Petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment on petition for *certiorari* is provided in Section 1254(c) of the Judicial Code (Title 28 U.S.C. §1254(c)).

STATUTE INVOLVED

The relevant statute involved is §151a(5) of the Railway Labor Act ("RLA"), Title 45 U.S.C. §151 et seq., which provides as follows:

> §151a. General purposes
>
> The purposes of the chapter are: . . . (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

STATEMENT OF THE CASE

SUMMARY OF FACTS:

Petitioner Kenneth D. Henegar, a former brakeman for the Norfolk and Western Railway Company ("N&W"), brought a state law defamation and libel/slander claim against Respondent William M. Banta, Petitioner's former railroad supervisor. This claim was filed in federal district court on March 13, 1992 pursuant to that court's diversity jurisdiction, Title 28 U.S.C. §1332.

On February 4, 1991, while working for N&W, Petitioner experienced abdominal pain after releasing handbrakes and while walking the train cars. Petitioner reported the occurrence to Respondent, his supervisor,

who filled out an injury report on Petitioner's behalf. The report that Respondent completed in Petitioner's presence reported the occurrence as an "injury" caused by a "strain". Unbeknownst to Petitioner, however, Respondent destroyed the original re[illegible] and replaced it with a new report which described Petitioner's occurrence as an illness not an injury and omitted any mention of a "strain". When Petitioner later filed an insurance claim for an on-the-job injury he was accused by his employer of making false statements and giving conflicting reports regarding the occurrence. N&W conducted a disciplinary hearing regarding these charges against Petitioner after which Petitioner was found guilty and his employment terminated.

In his Complaint, Petitioner alleged two instances of defamation and libel or slander committed by Respondent: (1) On February 4, 1991, Respondent prepared a false accident report identifying Petitioner's on-the-job occurrence an illness rather than an injury and did not disclose the existence of the original accident report which correctly recorded Petitioner's occurrence as an injury; and (2) Respondent made untrue and defamatory statements about Petitioner while appearing as a witness at the disciplinary hearing held by N&W on March 28, 1991. It was not until Respondent's July 22, 1992 deposition that Petitioner learned of yet another instance of defamation against him committed by Respondent. At the deposition, Petitioner discovered that Respondent also prepared libelous and untrue memoranda regarding his conversations with Petitioner concerning Petitioner's February 4, 1991 occurrence.

On January 20, 1993, Respondent filed a Motion for Summary Judgment asserting that Petitioner's claims were preempted by the RLA. Petitioner filed his Response to

Respondent's Motion on February 16, 1993. In his Response, Petitioner advised the court of all three instances of defamation committed by Respondent. On March 1, 1993 the District Court granted Respondent's Motion. Petitioner filed a timely Notice of Appeal on March 23, 1993.

The Sixth Circuit affirmed the trial court's Order in an opinion filed June 21, 1994. The Court of Appeals held that Petitioner's claim was preempted by the RLA since the alleged defamatory statements were made in the course of an investigation and hearing on Petitioner's personal injury claim. The court held that, because the investigation and hearing were conducted in accordance with the collective bargaining agreement ("CBA"), the district court did not err in holding that Petitioner's defamation claim was inextricably intertwined with the CBA and therefore preempted under the RLA. The Court of Appeals specifically refused to extend the standard enunciated by this Court in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) to RLA cases. Under *Lingle*, preemption is appropriate only in those cases where the action requires interpretation of the CBA.

On June 20, 1994, this Court decided *Hawaiian Airlines, Inc. v. Finazzo*, ____ U.S. ___, 114 S. Ct. 2239 (1994). In that case, this Court did extend the *Lingle* standard to RLA cases. Therefore, the Sixth Circuit's June 21, 1994 opinion was in direct conflict with the decision of this Court in *Hawaiian Airlines*, decided one day earlier.

REASON FOR GRANTING THE WRIT

THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH A DECISION OF THIS COURT.

The decision below should not be permitted to stand. The opinion of the district court, granting Respondent's Motion for Summary Judgment, made no mention of *Lingle* or its applicable standard. The court simply held that Petitioner's state-law defamation claim was "inextricably intertwined" with the CBA, and was thus preempted. (See Appendix B). In affirming the district court's opinion, the Sixth Circuit held that the test for determining whether a state cause of action is preempted by the RLA is:

> 'If the "action is based on a matrix of facts which are inextricably intertwined with the grievance machinery of the CBA and of the RLA," exclusive jurisdiction of the National Railroad Adjustment Board ("NRAB") preempts the action.'

Henegar v. Banta, No. 93-3315, 1994 WL 266751, at *2 (6th Cir. 1994) (quoting *Stephens v. Norfolk & W. Ry.*, 792 F.2d 576, 580 (6th Cir. 1986); and *Magnuson v. Burlington N., Inc.*, 576 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978)), see Appendix A, at A-5.

The Sixth Circuit rejected Petitioner's argument that the analysis under this Court's decision in *Lingle* should be applied. In *Lingle*, this Court determined that a state law cause of action is preempted by the Labor Management Relations Act ("LMRA") only if the action requires interpretation of the CBA. The Court of Appeals, however, refused to extend *Lingle* beyond LMRA cases. *Henegar*, at *3, Appendix A, at A-7.

The opinion below, decided and filed June 21, 1994, is in direct conflict with this Court's *Hawaiian Airlines, Inc.*

v. Finazzo opinion, decided June 20, 1994. In *Hawaiian Airlines*, this Court held that the *Lingle* analysis *was* appropriate for RLA as well as LMRA cases ("we conclude that Lingle provides an appropriate framework for addressing pre-emption under the RLA, and we adopt the Lingle standard to resolve claims of RLA pre-emption.") *Id.* at ____, 114 S. Ct. at 2249. This Court expressly stated that:

> 'when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished.'

Id. at ____ n.8, 114 S. Ct. at 2247 n.8 (quoting *Livadas v. Aubry*, ____ U.S. ____, ____, 114 S. Ct. 2068, 2078 (1994); citing *Lingle*, 486 U.S. 399, 413 n.12 (1988)).

In the case at bar, contract terms are not at issue. Petitioner does not claim that Respondent violated any portion of the CBA, nor does Petitioner contend that any portion of the CBA is relevant to the instant litigation. The defamatory statements were made on an accident report, in memoranda penned by Respondent regarding conversations with Petitioner, and finally at Petitioner's disciplinary hearing. The accident report and memoranda have absolutely nothing to do with the CBA. Neither of these items are necessary predicates to a disciplinary hearing. Furthermore, even Respondent's defamatory testimony given at Petitioner's disciplinary hearing does not involve the CBA for purposes of this lawsuit.

The Court of Appeals' opinion contains a two sentence conclusory reference, purportedly applying the *Lingle* standard to the facts of this case. The court stated:

> even under *Lingle*, there would be preemption on the facts of this case because an "unprivileged publication" is an element of defamation in Michigan, [citation omitted], and to determine whether Banta's remarks are privileged, a court would inevitably have to interpret the terms of the collective bargaining agreement since Banta allegedly made these statements during a grievance proceeding mandated by the collective bargaining agreement.

Henegar, at *3, Appendix A, at A-8. The court's cursory mention of *Lingle* does not adequately apply the appropriate standard.

First, the foregoing passage fails to address the two other instances in which Petitioner claims he was defamed, namely the falsified accident report and Respondent's memoranda. As stated previously, neither the accident report nor the memoranda is a necessary predicate to a disciplinary hearing and the CBA has no bearing on them whatsoever. This fact has been acknowledged in the affidavit of Ralph Herman, Petitioner's Union Local Chairman in 1991 ("the filing of an accident report required by company rules is an activity separate and apart from any disciplinary proceeding pursuant to the Collective Bargaining Agreement." Appendix C, Affidavit of Ralph Herman). In fact, the only writing required by the CBA is a Notice of Hearing (See Appendix D). Neither the accident report nor Respondent's memoranda has anything to do with notice.

Second, the court does not specify what terms of the CBA would have to be interpreted. The court states that interpretation of the CBA is necessary to determine whether Respondent's "remarks" are privileged, however, no part of the CBA addresses "privilege" under Michigan law. Therefore, identification of CBA terms that require interpretation is an impossibility.

Finally, even if it were necessary to consult the CBA to determine whether Respondent's statements were privileged under state law, this Court has held that this is not enough to require preemption of a state law claim under the RLA. *Hawaiian Airlines*, at ____ n.8, 114 S. Ct. at 2247 n.8. Because the meaning of the terms of the CBA is not in dispute, " 'the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished.' " *Id.*, (quoting *Livadas v. Aubry*, ____ U.S. ____, ____, 114 S. Ct. 2068, 2078 (1994), citing *Lingle*, 486 U.S. 399, 413 n.12 (1988)). In this case, there is no dispute over how to give effect to the terms of the CBA. Petitioner merely seeks to pursue his state-law defamation claim against Respondent, a claim which is clearly independent of the CBA. Therefore, this case does not constitute a "grievance" within the meaning of the RLA, and federal preemption under that Act is inappropriate.

The issues involved in this case do not require interpretation of any term of the CBA. Petitioner's state law claim is therefore independent of the CBA and not preempted by the RLA. Thus, the decision of the Sixth Circuit Court of Appeals should not stand and Petitioner's claim should be construed in accordance with this Court's applicable precedent.

CONCLUSION

Therefore, Petitioner respectfully requests that this Court grant *certiorari* to review the judgment below and reverse the decision of the district court and remand this cause for a full hearing on the merits. In the alternative, Petitioner respectfully requests that this Court vacate the opinion of the Sixth Circuit Court of Appeals and remand for a determination of whether Petitioner's claim is pre-empted by the RLA in light of this Court's *Hawaiian Airlines* decision.

Respectfully submitted,

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APPENDICES

APPENDIX A

9 Indiv.Empl.Rts.Cas. (BNA) 993

Kenneth D. HENEGAR, Plaintiff-Appellant,

v.

William M. BANTA, Defendant-Appellee.

No. 93-3315.

United States Court of Appeals,

Sixth Circuit.

June 20, 1994.

On Appeal from the United States District Court for the Northern District of Ohio

Before RYAN and NORRIS, Circuit Judges; and BERTELSMAN, Chief District Judge.*

RYAN, Circuit Judge.

In an order granting summary judgment, a federal district court dismissed Kenneth D. Henegar's defamation suit against William M. Banta, his former superior at the Norfolk and Western Railway Company, 817 F.Supp. 668. Henegar has appealed and presents us with a single issue: whether the district court erred in concluding that Henegar's defamation claim was "inextricably intertwined" with the collective bargaining agreement between Henegar's union and the railroad, and consequently, was preempted under the Railway Labor Act. 45 U.S.C. Sec. 151 *et seq.* We think the district court did not err and we affirm.

---

* The Honorable William O. Bertelsman, Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

I.

Henegar was a brakeman for Norfolk and Western Railway Company; Banta was his supervisor. Henegar's employment was governed by a collective bargaining agreement between his union, the United Transportation Union, and Norfolk and Western. On February 4, 1991, Henegar began to suffer stomach pains while at work. He drove himself to the hospital and there he was told that he had a hernia. Banta met Henegar at the hospital and then drove him back to work. Banta claims that during the drive back, Henegar said that he had known for some time that he had a hernia but was afraid to have surgery.

Subsequently, Henegar had his hernia repaired and filed a claim with the railroad, alleging that the hernia was a work-related injury. Upon learning of this, Banta charged Henegar under the collective bargaining agreement with giving false and conflicting statements about his alleged injury. The railroad scheduled a hearing to investigate.

At the hearing, Banta testified that Henegar told him that he had been aware of the hernia for at least one year. The railroad also introduced hospital records which indicated that Henegar had long been aware of the hernia. The hearing officer found that Henegar's claim of a work-related injury was inconsistent with the hospital records and the statements he made to Banta. Based on this finding, the hearing officer dismissed Henegar from his railroad employment. On appeal, a public law board affirmed.

Henegar then filed the diversity action in federal district court alleging that Banta had defamed him by making false statements at the hearing and in an accident report and other memoranda. Henegar's evidence was primarily Banta's notes regarding the incident and two copies of a "Report of Personal Injury/Illness Incident," both dated February 4, 1991.

Banta moved for summary judgment, which the district court granted, after concluding that Henegar's defamation suit was preempted by the Railway Labor Act because it was "inextricably intertwined" with the collective bargaining agreement. Now, on appeal, Henegar claims the district court erred in concluding that the defamation suite was preempted because the determination of Henegar's state law claim will not require an interpretation of the collective bargaining agreement.

II.

We review a grant of summary judgment *de novo* and use the same test as used by the district court. Brooks v. American Broadcasting Cos., 932 F.2d 495, 500 (6th Cir. 1991). In reviewing summary judgment motions, courts must view the evidence in the light more favorable to the nonmoving party to determine whether a genuine issue of material fact exists. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). Under Fed.R.Civ.P. 56(c), summary judgment is proper if all the evidence before the district court " 'show[s] that there is not genuine issue as to any material fact and that the moving party is entitled to [a] judgment as a matter of law.' " Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc., 862 F.2d 597, 601 (6th Cir. 1988) (quoting Fed.R.Civ.P. 56(c)). Once the moving party has met its burden of production, the nonmoving party must go beyond the pleadings, and by affidavits, or by " 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 56(e)).

III.

The Railway Labor Act (RLA) governs labor relations in the railroad industry. The RLA does not explicitly address the issue of preemption but it does set out some general purposes:

> (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. Sec. 151a. As part of its mandate, the RLA directs employers and employees in the railroad industry to resolve most job-related disputes without recourse to the courts. *Id.* at Secs. 152, 153.

> The RLA . . . provides a comprehensive framework for the resolution of labor disputes in the railroad industry . . . [by] establish[ing] elaborate administrative procedures for the resolution of both major and minor labor disputes. . . Minor disputes initially must be dealt with through a railroad's internal dispute resolution processes, and if not settled there, may be submitted to a division of the Adjustment Board, or to a Public Law Board, which is an arbitration board chosen by the parties.

Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 562-63, 107 S.Ct. 1410, 1414, 94 L.Ed.2d 563 (1987) (footnote omitted).

The RLA gives the National Railroad Adjustment Board (NRAB) exclusive jurisdiction over "minor" disputes that arise out of collective bargaining agreements. Union Pacific R.R. Co. v. Sheehan, 439 U.S. 89, 93-94, 99 S.Ct. 399, 402, 58 L.Ed.2d 354 (1978)). A dispute is "minor" under the RLA if grows " 'out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.' " Atchison, 480 U.S. at 563, 107 S.Ct. at 1414 (quoting 45 U.S.C. Sec. 153(i)). "The final and exclusive jurisdiction of the Board has a broad sweep; no grievance that may fairly be said to stem from the collective bargaining agreement is excluded." Beard v. Carrollton R.R., 893 F.2d 117, 121 (6th Cir. 1989).

In certain instances, the NRAB's exclusive jurisdiction over minor disputes will preempt an employee's state law claim. In Stephens v. Norfolk and Western Railway Co., 792 F.2d 576 (6th Cir. 1986), this circuit announced a test for determining whether a state cause of action is preempted under the RLA: "If the 'action is based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the R.L.A.,' exclusive jurisdiction of the NRAB preempts the action." Id. at 580 (quoting Magnuson v. Burlington N., Inc., 576 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 930, 99 S.Ct. 318, 58 L.Ed.2d 323 (1978)).

Other courts have held that the RLA preempts state law claims based on libel and slander. In Edelman v. Western Airlines, Inc., 892 F.2d 839 (9th Cir.1989), an airline fired a flight attendant for stealing. The flight attendant sued for, among other things, defamation. The Ninth Circuit held that her defamation claim was inextricably intertwined with the collective bargaining agree-

ment because, in assessing the validity of the claim, the court would have "to analyze the Agreement to decide whether Edelman's discharge was justified." Id. at 844.

In Miller v. Norfolk & Western Railway Co., No. 89-4101, 1990 WL 163302, at *4, 1990 U.S.App. LEXIS 19129, at *7 (6th Cir. Oct. 25, 1990), we held that the RLA pre-empted an employee's claim that his supervisor made defamatory remarks about him during a disciplinary investigation. We reasoned that because the alleged defamatory statements were accusations made during an investigation and hearing conducted under a collective bargaining agreement, the defamation claim was inextricably intertwined with the collective bargaining agreement:

> The exclusive jurisdiction of the NRAB over minor disputes was created "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. Sec. 151a. If we were to permit a claim like the plaintiff's to evade the jurisdiction of the board, "the congressional purpose of providing a comprehensive federal scheme for the settlement of employer-employee disputes in the railroad industry, without resort to the courts, would be thwarted." Magnuson, 576 F.2d at 1369. Claims that relate to matters covered in or by grievance proceedings must be preempted by the RLA, or else they will have a chilling effect on these proceedings. The inquiry, therefore, must focus on the claim's relation to the proceedings under the [collective bargaining agreement] as a whole, and not on whether specific issues would be addressed in both the state law claim and the grievance proceedings.

Id. at *5, 1990 U.S. App. LEXIS 19129, at *14-15.

The same reasoning applies here. The alleged defamatory statements in this case were Banta's accusations that

Henegar was not injured on the job but rather that he suffered from a prolonged, preexisting illness. Banta made these statements in the course of an investigation of Henegar's personal injury claim. The investigation and the hearing were conducted in accordance with the collective bargaining agreement. Consequently, we conclude that the district court did not err in holding that Henegar's defamation claim was inextricably intertwined with the collective bargaining agreement and preempted under the RLA.

Henegar argues, however, that under Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 1081 S.Ct. 1877, 100 L.Ed.2d 410 (1988), a state law claim is preempted only if the action requires interpretation of the collective bargaining agreement. Lingle, however, dealt with preemption under the National Labor Relations Act, and we have declined to extend Lingle beyond NLRA cases. *See* Smolarek v. Chrysler Corp., 879 F.2d 1326, 1334-35 n. 4 (6th Cir.) (*en banc*), *cert. denied*, 493 U.S. 992, 110 S.Ct. 539, 107 L.Ed.2d 537 (1989). On reviewing both the RLA and the NLRA, the Supreme Court has observed: "the analysis . . . under each statute is quite distinct." Buell, 480 U.S. at 565, 107 S.Ct. at 1415. In short, preemption under the RLA is more pervasive.[1] *See, e.g.*, Underwood v. Venango River Corp., 995 F.2d 677, 680-81 (7th Cir.1993); Lorenz v. CSX Transp., Inc., 980 F.2d 263, 268-69 (4th Cir.1992); Hubbard v. United Airlines, Inc., 927 F.2d 1094, 1097 (9th Cir.1991). The

[1] McCall v. Chesapeake & Ohio Ry. Co., 844 F.2d 294 (6th Cir.), *cert. denied*, 488 U.S. 879, 109 S.Ct. 196, 102 L.Ed.2d 166 (1988), an RLA case, was decided before Lingle. A subsequent order denying rehearing in that case states that Lingle would not change the result of that case; the order says nothing more. Id. at 304.

language of the RLA itself is broader in that it purports to cover "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements." 45 U.S.C. Sec. 153(i). The NLRA, in contrast, is limited to the "violation of contracts between an employer and a labor organization." 29 U.S.C. Sec. 185(a). In sum, we decline to extend Lingle to an RLA case. But even under Lingle, there would be preemption on the facts of this case because an " 'unprivileged publication' " is an element of defamation in Michigan, New Franklin Enterprises v. Sabo, 192 Mich.App. 219, 480 N.W.2d 326, 328 (1991) (citation omitted), *appeal denied*, 439 Mich. 951, 482 N.W.2d 760 (1992), and to determine whether Banta's remarks are privileged, a court would inevitably have to interpret the terms of the collective bargaining agreement since Banta allegedly made these statements during a grievance proceeding mandated by the collective bargaining agreement.

Accordingly, we AFFIRM.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:92CV7152

Kenneth D. Henegar,

Plaintiff

vs.

William M. Banta,

Defendant

OPINION AND ORDER

Potter, J.:

This cause is before the Court on defendant's motion for summary judgment and plaintiff's opposition. A former brakeman with Norfolk and Western Railway Company, plaintiff was allegedly defamed by his supervisor who claimed that Mr. Henegar gave false and conflicting statements regarding an injury that occurred on February 4, 1991.

> Under the Federal Rules of Civil Procedure, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The Supreme Court has recently stated that the inquiry is "whether the evidence presents a Sufficient disagreement to require submission to a jury to whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2512 (1986). . . . In reviewing a motion for summary judgment, however, all infer-

> ences " 'must be viewed in the light most favorable to the party opposing the motion.' " *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356-57 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

Ralph Shrader, Inc. v. Diamond International Corp., 833 F.2d 1210, 1213 (6th Cir. 1987).

The party moving for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which [he] believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The substantive law of the case identifies which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Therefore, only disputes of facts affecting the outcome of the suit under the applicable substantive law will preclude the entry of summary judgment. *Id.* A moving party may discharge its burden "by 'showing'—that is, pointing out to the support the nonmoving party's case." *Celotex*, 477 U.S. at 324-325. Where the moving party has met its initial burden, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250.

> [W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleading, depositions, answers to interrogatories, and admissions on file.". . . Rule 56(e) therefore requires the nonmoving party to go beyond the pleading and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Celotex, 477 U.S. at 324.

As noted above, plaintiff was employed as a brakeman by the Norfolk and Western Railway Company. Defendant was his supervisor. Plaintiff was covered by a collective bargaining agreement between United Transportation Union and his employer. Plaintiff asserts that on February 4, 1991, he began to suffer stomach pains and while at work at a switching yard in Milan, Michigan. At the hospital he was told that he had a hernia. Part of the controversy centers on whether Henegar was aware of this condition for many months prior to this incident or if the hernia was caused by a work-related injury.

In any event, after plaintiff made a statement to the railroad claims agent asserting that the injury was in fact work related, defendant formally charged him under the collective bargaining agreement with having provided false and conflicting statements concerning his alleged injury. As required by the agreement, a disciplinary hearing was held on March 28, 1991. Plaintiff was represented by the union local chairman. Banta testified that Henegar had told him that he had been aware of the hernia for at least one year and that he had been postponing surgery recommended by his physician. Apparently, the Saline Community Hospital records, which also reflected that Henegar had long been aware of the hernia, were also apparently introduced. Presented with this evidence, the hearing officer found against plaintiff. On appeal, the public law board affirmed the decision dismissing Henegar.

Plaintiff is now before this Court asserting that defendant defamed him. The amended complaint alleges that

> The statements made by defendant against plaintiff at said investigation were false. The effect of defendant's false statements in the presence of three wit-

> nesses was to brand the plaintiff as a liar and a cheat and an attack on his reputation and character which up to that time was unblemished.

Plaintiff further alleges that as a proximate result he lost his job and his reputation was irreparably damaged. Plaintiff's opposition has attached as exhibits 1 and 2 copies of a "report of personal injury/illness incident" both dated February 4, 1991 that purport to show that defendant changed the type and source of injury from "strain" to "illness." Plaintiff alleges that the second report, indicating illness, was submitted at the disciplinary hearing and that the hearing officer was purposely mislead into believing that the second report was an accurate duplication of the information contained in the original report. Exhibit 3 is the progress notes of Banta that rack the events concerning the February 4th incident which indicate that defendant believed that Henegar's injury was not the result of an injury sustained while working for the railroad. The Court has reviewed defendant's deposition testimony and the explanation given therein for the existence of the two reports as well as plaintiff's deposition and the exhibits thereto. Nevertheless, any conclusion that might be drawn from all the evidence contained in the record is irrelevant if there is no subject matter jurisdiction.

> The Railway Labor Act gives the National Railroad Adjustment Board exclusive jurisdiction over disputes that arise out of collective bargaining agreements. The final and exclusive jurisdiction of the Board has a broad sweep; no grievance that may fairly be said to stem from the collective bargaining agreement is excluded.
>
> . . .
>
> The pertinent question here is . . . whether the "action is based on a matrix of facts which are inextricably intertwined [sic] with the grievance machinery

> of the collective bargaining agreement and the R.L.A." *Stephens v. Norfolk & W. Ry.*, 792 F.2d 576, 580 (6th Cir. 1986), *amended*, 811 F.2d 286 (6th Cir. 1986).

Beard v. Carrollton R.R., 893 F.2d 117, 121-22 (6th Cir. 1989) (citations omitted). This inextricably intertwined test is the same one used by the Supreme Court in cases under §301 of the Labor Management Relations Act. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985). Nevertheless, "[t]he standards under the two statutes may not be identical. The Railway Labor Act makes all grievances arising out of the collective bargaining agreement subject to arbitration, and it is probably more likely that a state claim will interfere with federal interests in the context of the statute." *Beard*, 893 F.2d at 122.

Upon review of the record, the Court finds that plaintiff's claims are inextricably intertwined with the Collective Bargaining Agreement (Agreement). The personal injury reports complained of by plaintiff were required as part of the normal investigatory function of plaintiff's supervisor and a predicate to any disciplinary action against a union employee under the Agreement. The result of that investigation led to a disciplinary action against a union employee under the Agreement. The result of that investigation led to a disciplinary hearing. The hearing officer found that the plaintiff did not incur a hernia injury on February 4, 1991 and that plaintiff was guilty of falsification of an alleged personal injury. This finding was upheld on appeal to the public law board. The prior proceedings have already specifically considered the veracity of plaintiff and defendant. Although defamation was not an issue before the board, whether plaintiff lied to the company was at issue. Therefore, the plaintiff's defamation claim is based upon a matrix of facts that are inextricably intertwined with the collective bargaining agreement.

This finding is consistent with other district courts that have considered this question:

> This letter clearly was written for the sole purpose of complying with the specific notice requirements of Article 31, entitled "Investigation and Discipline", of the collective bargaining agreement governing the relationship between Plaintiff and Southern. Plaintiff's libel claims thus bear a substantial relationship to the collective bargaining agreement, and are "based upon a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the RLA", and are as a result preempted by the RLA. Any contrary result would effectively chill the employer's ability to invoke the disciplinary article of the agreement, or even to notify the employee either of its intent to invoke the disciplinary article or of the charges against that employee, without risking subsequent liability for libel and/or defamation. *See Miller v. Norfolk & Western*, cited *supra*, slip op. at 7-8 ("Claims that relate to matters covered in or by grievance proceedings must be preempted by the RLA, or else they will have a chilling effect on these proceedings."). Therefore, the Court finds plaintiff's claims under Counts III and IV of his Complaint to be preempted by the RLA.

Fox v. Southern Ry. Co., 764 F. Supp. 644, 650 (N.D. Ga. 1991).

> The RLA also bars Ferguson's suit for defamation against Berry and NS. While defamatory statements are not covered specifically by the collective bargaining agreement between NS and BRAC, the fact that a claim is not expressly addressed by an agreement is immaterial for purpose of coverage by the RLA. *Elgin J. & E. Ry. v. Burley*, 325 U.S. 711, 723, 65 S. Ct. 1282, 1289, 89 L.Ed. 1886 (1945). Investigations of employee complaints are covered by the NS-BRAC agreement and are normal incidents of the employer-employee relationship. *Majors v. U.S.*

> *Air, Inc.*, 525 F. Supp. 853, 857 (D. Md. 1981). Any dispute arising out of such an investigation, including a charge of defamation, should fail within the NRAB's exclusive jurisdiction. *See, e.g., Miller v. Norfolk & Western Ry. Co.*, No. 83-3652, slip op. (N.D. Ohio 1984) *Farley v. Hayes*, 112 L.R.R.M. 2298 (S.D. Ill. 1982) [1982 WL 2040]; *Majors, Supra*, 525 F. Supp. at 853; *Carson v. Southern Ry. Co.*, 494 F. Supp. 1104 (D.S.C. 1979). Thus even if Berry did defame Ferguson when she remarked about him during officer Moorman's interview, then that issue can be resolved only by the NRAB. This court, however, is without jurisdiction to address that issue.

Ferguson v. Norfolk Southern Corp., 704 F. Supp. 666, 670 (W.D.Va. 1987).

Furthermore, it can fairly be said that plaintiff's claim is based on some incident of the employment relationship. Such a finding was found to be sufficient to preclude jurisdiction under RLA in *Majors v. U.S. Air, Inc.*, 525 F. Supp. 853 (D.Md. 1981); *accord, Miller v. Norfolk & Western Ry. Co.*, 1990 U.S. App. Lexis 19129 (6th Cir. 1990) (unpublished). The fact that plaintiff has named an individual, rather than the corporate, defendant does not change the nature of this collateral attack on the judgment of the public law board. "As in *Mangnuson*,[1] the plaintiff here has attempted to restyle claims which are basically identical to those which should be considered by the National Railway Adjustment Board, and the Court cannot allow the plaintiff's 'artful pleading' to evade the mandatory arbitration provisions of the Railway Labor

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[1] *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir. 1978), *cert. denied*, 439 U.S. 930 (1978) (claims related to the alleged presentation of false and misleading information at the hearing were raised pursuant to the collective bargaining agreement and therefore required to be submitted to arbitration).

Act." *Gray v. Chessie System*, 588 F. Supp. 1334, 1337 (D. Md. 1984); *accord*, *Fox v. Southern Ry. Co.*, 764 F. Supp. 644 (N.D. Ga. 1991).

The Court finds that it does not have subject matter jurisdiction to hear plaintiff's cause of action as it is a "minor dispute" stemming from the interpretation or application of an existing collective bargaining agreement. In *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 325 (1972), the Supreme Court held that

> The term "exhaustion of administrative remedies" in its broader sense may be an entirely appropriate description of the obligation of both the employee and carrier under the Railway Labor Act to resort to dispute settlement procedures provided by that Act. It is clear, however, that in at least some situations the Act makes the federal administrative remedy exclusive, rather than merely requiring exhaustion of remedies in one forum before resorting to another. A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding. *Union Pacific R. Co. v. Price*, 360 U.S. 601 (1959). He is limited to the judicial review of the Board's proceedings that the Act itself provides. *Gunther v. San Diego & A.E.R. Co.*, 382 U.S. 257 (1965). In such a case the proceedings afforded by 45 U.S.C. §153 First (i), will be the only remedy available to the aggravated party.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendant's motion for summary judgment be, and hereby is, GRANTED; and it is

FURTHER ORDERED that all other pending motions are DENIED as moot.

/s/ _____
Sr. United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. 3:92-CV-7152
JUDGE JOHN W. POTTER

KENNETH D. HENEGAR,

Plaintiff,

v.

WILLIAM M. BANTA,

Defendant.

AFFIDAVIT OF RALPH HERMAN

Ralph M. Herman, being first duly sworn on oath, deposes and states as follows:

1. That I am an employee of the Norfolk Southern Railway Company;

2. That in January, February and March of 1991, I was the Union Local Chairman for Trainman, Kenneth D. Henegar;

3. That the Collective Bargaining Agreement applicable to such Disciplinary Hearings does not provide for any neutral or independent person to be the Finder of Fact. The Finder of Fact is chosen exclusively by the railroad management and is always a management or carrier official.

4. That the Collective Bargaining Agreement does require an official charge letter to be sent to the employee as well as a written Notice of Discipline.

5. That the Collective Bargaining Agreement does give the employee an opportunity to be present at the Disciplinary Hearing, give whatever evidence he so chooses, and also prescribes certain time limits for action by the carrier.

6. That the Management Official, or Finder of Fact at the Disciplinary Hearing makes his determination based upon evidence presented at the hearing. Typically, the evidence is provided by individuals who have direct knowledge of the facts or circumstances which are allegedly under investigation.

7. That in my experience, the witnesses can be carrier officials, other trainmen, clerical staff, documentary evidence, sometimes medical personnel or records, as well as other persons who are not employees of the railroad at all.

8. That the charged employee has no right to have an attorney present. Further, it is unusual to ever receive copies of documents to be introduced at the hearing by management prior to the hearing. As such, there is very little advance opportunity to review evidence which will be presented. In the case of Mr. Henegar, I had no opportunity to review any of the documentary evidence prior to the hearing.

9. That it is my understanding, that as a supervisor, Mr. Banta has a duty to report on the accident report the words as Mr. Henegar told him. Unknown to me at the hearing, Mr. Banta prepared two very different accident reports regarding Mr. Henegar's occurrence of February 4, 1991, but never revealed the existence of the original accident report which more accurately reflected what Mr. Henegar told him.

10. That at the hearing, I objected to the fact that Mr. Banta had discussed the allegations against Mr. Henegar with the hearing officer, Don Kimbrough, the day before the hearing. My objection was overruled. After hearing that both Mr. Kimbrough and Mr. Banta now admit that they discussed the facts to be presented against Mr. Henegar, I feel that is further indication and conclusive proof that these situations of company disciplinary hearings are not presented to a neutral or independent fact finder.

11. That there is no provision in the Collective Bargaining Agreement where train service employees or members of the United Transportation Union in any way agree to be bound by the determinations of the hearing officer.

12. That the filing of an accident report required by company rules is an activity separate and apart from any disciplinary proceeding pursuant to the Collective Bargaining Agreement.

/s/ _____
RALPH M. HERMAN

STATE OF _____)
COUNTY OF _____)—ss

SUBSCRIBED and SWORN TO before me this _____ day of _____, 19____.

/s/ _____
NOTARY PUBLIC

My commission expires: _____

APPENDIX D

AGREEMENT

between

NORFOLK AND WESTERN RAILWAY COMPANY AND THE EMPLOYEES REPRESENTED BY THE UNITED TRANSPORTATION UNION (C-T-E)

It is agreed that effective April 30, 1984, Article 38 of the Schedule for Conductors and Brakemen, revised June 15, 1979; Article 15 of the Schedule for Yardmen, effective July 1, 1982; and Rule 51 of the Schedule for Firemen, revised October 1, 1977, are superseded by the following Discipline Rule and Procedures:

SECTION A. General Requirements

1. An employee shall not be discharged, suspended or otherwise disciplined without just cause and without a fair and impartial hearing, except that an employee may waive a hearing in accordance with Section B(2) of this Agreement.

2. An employee shall not be held from service pending hearing except in serious cases, such as theft, altercation, Rule "G": violation, insubordination, major accidents, serious misconduct and major offenses whereby the employee's retention in service could be hazardous.

SECTION B. Formal Hearing

1. Notice of Hearing

(a) An employee directed to attend a formal hearing to determine the employee's responsibility, if any, in

connection with an occurrence or incident shall be notified in writing by certified mail, return receipt requested, to the last known address within a reasonable period of time but not to exceed ten (10) days from the date of occurrence, or where the occurrence is of a nature not immediately known to the employee's supervisor(s), from the time they first have knowledge thereof. The notice shall contain a clear and specific statement of the date, time, place and nature of the occurrence or incident that is to be the subject of the hearing. The notice shall be sent in duplicate in order that the employee may transmit a copy to the employee's representative if the employee desires.

NOTE: This rule does not preclude delivery of the notice at reasonable times by a Carrier representative. Such delivery at the employee's home shall be made only when other means of delivery are not practicable.

(b) The notice shall state the date, time and place the hearing is to be held which shall not be less than five (5) days after the date of notification or more than ten (10) days after the date of notification unless otherwise agreed to.

(c) The Carrier will have the responsibility of producing sufficient witnesses to develop the facts concerning the incident or occurrence being investigated and the notice of hearing shall include the name of each person receiving the notice and the names of all witnesses known at the time of the notice that the Carrier intends to have in attendance at the hearing. The employee or the employee's representative may bring to the attention of the responsible Carrier official the name or names of other witnesses who may provide material facts.

(d) The notice shall inform each employee so notified of the right to representation and to bring in witnesses.

(e) If an employee who is to receive a notice of hearing will not be permitted to exercise the option under Section B(2) of this Agreement, the notice of hearing so shall so specify.

2. Waiver of Hearing

(a) An employee who has been notified to appear for a hearing shall have the option, prior to the hearing, to discuss with the appropriate Carrier official, either personally, through or with the employee's representative, the act of occurrence and the employee's responsibility, if any.

If disposition of the charges is made on the basis of the employee's acknowledgement of responsibility, the disposition shall be reduced to writing and signed by the employee and the official involved and shall incorporate a waiver of hearing and shall specify the maximum discipline which may be imposes for employee's acceptance or responsibility.

Disposition of cases under this paragraph (a) shall not establish precedence in the handling of any other cases.

(b) No minutes or other record will be made of the discussions and, if the parties are unable to reach an agreed upon disposition on this basis, no reference shall be made to these discussions by either of the parties in any subsequent handling of the charges under the discipline procedure.

3. Postponements of Hearing

(a) Consistent with the provisions of Section A. 1 for a fair and impartial hearing, postponements of the formal hearing may be requested by either party on reasonable grounds and consent shall not be unreasonably withheld.

4. Conduct of Hearing

(a) The hearing shall be conducted by an officer of the employing Carrier who may be assisted by other officers. If practicable to do so, the hearing shall be held at the home terminal of the employee involved or in cases where more than one employee is involved at the home terminal of the majority of the employees.

NOTE: When another Carrier is involved, this will not preclude an officer of that Carrier from conducting the hearing or assisting in the hearing recognizing, in any case, that there shall be only one presiding (hearing) officer.

(b) The employee shall have the right to be represented at the hearing by an employee or an organization representative of the employee's own choosing. The employee and/or the employee's representative shall have the right to introduce witnesses in the employee's behalf, to hear all testimony introduced, and to question all witnesses.

(c) An employee's personal service record will not be included in or referred to in the hearing or in the transcript of the proceedings of the hearing. The employee's personal record may be taken into consideration in assessing the amount of discipline imposed, if any.

(d) If the formal hearing is not held within the time limits specified in Section B. 1(b), the employee will not be disciplined, will be paid for all time lost, and no disciplinary entry will be made in the employee's personal service record.

(e) The employee and witnesses will be permitted time off if requested in order to have sufficient rest prior to and following the hearing.

SECTION C. Transcript of Hearing

1. It is recognized that the Carrier is responsible for ensuring that an accurate transcript of the hearing proceedings is made. However, this will not preclude the employee or employee's representative from making a record of the proceedings for their own use.

2. If, during the hearing, a partial transcript is made prior to conclusion of the hearing such partial transcript will be made available to the employee and employee's representative upon request. If electronic recording devices are used and recording are available for review by Carrier officials, they also shall be made available upon request for review by the employee and employee's representatives at the appropriate Carrier facility.

3. In any cases where discipline is assessed, or in cases where discipline is not assessed but nevertheless there is a transcript, copy of the transcript will be furnished to the employee and the employee's representative promptly upon request.

SECTION D. Hearing Decision

1. If the formal hearing results in assessment of discipline, such decision shall be rendered within fifteen (15) calendar days from the date the hearing is concluded, and the employee will be notified in writing of the reason therefor by certified or registered U.S. mail with additional copy provided for the employee representative.

NOTE: This rule does not preclude delivery of the decision at reasonable times by a Carrier representative. Such delivery at the employee's home shall be made only when other means of delivery are not practicable.

2. If the hearing does not result in discipline being assessed, any charges related thereto entered in the employee's personal service record shall be voided.

SECTION E. Compensation for Attending Hearings

1. Witnesses, as referred to in Section B. 1(c), who are directed by the Carrier to attend a hearing, shall be compensated for all time lost and, in addition, will be reimbursed for actual, reasonable and necessary expenses incurred for each day of the hearing. Where no time is lost, they will be paid for actual time attending the hearing, with a minimum of four (4) hours, to be paid for at the rate of pay applicable to the last service performed.

2. When an employee involved in a formal hearing is not assessed discipline, the employee shall be compensated for all time lost. In addition, the employee will be reimbursed for actual, reasonable and necessary expenses incurred for each day of the hearing. Where no time is lost, the employee shall be paid for actual time attending the hearing with a minimum of four (4) hours for each day of the hearing, to be paid for at the rate of pay applicable to the last service performed.

SECTION F. Time Limit on Appeals

1. When discipline has been assessed as a result of a formal hearing and the decision as rendered by the Carrier is not acceptable to the employee, any appeal must be presented in writing by or on behalf of the employee involved, to the officer of the Company authorized to receive same, within thirty (30) days from the date of notification of the assessment of discipline. Failing to comply with this provision the decision shall be considered

final, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other discipline cases. The Carrier shall, within thirty (30) days from the date the appeal if filed render a decision in writing on the appeal and, if the appeal is denied, the reasons for such denial shall be given. If no decision is rendered within thirty (30) days, the appeal shall be considered valid and settled accordingly, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other discipline cases.

2. The procedure outlined in Paragraph 1 shall govern in appeals taken to each succeeding officer (*). Decision by the highest officer designated to handle discipline matters shall be final and binding unless within thirty (30) days after written notice of the decision, said officer is notified in writing that the decision is not accepted.

Thereafter, if conference is requested by either party, it will be held within thirty (30) days of date of decision, otherwise conference will be considered as having been waived by mutual consent. All appeals involved in a decision of the highest officer shall be barred unless within ninety (90) days from the date of said officer's decision proceedings are instituted by the employee or the employee's duly authorized representative before a tribunal having jurisdiction pursuant to law or agreement of the matter involved.

NOTE: (*) There shall not be more than two (2) succeeding officers involved in the appeals process. Where there is only one succeeding officer involved in the appeals process, there will be no change in that procedure by reason of this Section.

3. With respect to appeals involving an employee dismissed, suspended or held out of service, the original

notice of request for reinstatement with pay for time lost shall be sufficient.

4. If at any point in this appeals procedure or in proceedings before a tribunal having jurisdiction it is determined that the employee should not have been disciplined, any charges related thereto entered in the employee's personal service record shall be voided and, if required to lose time or if held out of service (suspended or dismissed), the employee shall be reinstated with pay for all time lost and with seniority and other rights unimpaired.

5. If discipline assessed is by suspension, time lost by an employee when held out of service shall be deducted from the assessed period of suspension.

SECTION G. Effect of Time Limits

1. The time limits set forth in this Agreement will govern the discipline procedure to the exclusion of any other rule, practice or agreement to the contrary and such time limits may be extended by mutual agreement in writing.

SECTION H.

1. This agreement will remain in full force and effect until April 30, 1985, and thereafter unless written notice is served by any signatory party hereto no later than March 31, 1985, to cancel the Agreement effective April 30, 1985. If the Agreement is not cancelled as herein provided, it will remain in full force and effect until changed or modified in accordance with the provisions of the Railway Labor Act, as amended.

Signed at St. Louis, Missouri, this 11th day of April, 1984.

FOR THE EMPLOYEES:	FOR THE NORFOLK & WESTERN RAILWAY COMPANY: R. C. Steel, Jr.
/s/ _____	By /s/ _____
General Chairman	Regional Director
UTU, C,T,&E	Labor Relations

Supreme Court, U.S.
FILED
NOV 18 1994
OFFICE OF THE CLERK

(2)

No. 94-503

In The

Supreme Court of the United States

October Term, 1994

KENNETH D. HENEGAR,

Petitioner,

v.

WILLIAM M. BANTA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT WILLIAM M. BANTA IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Petitioner has identified the following as the question presented for review:

> "Whether the Sixth Circuit Court of Appeals' opinion, decided and filed June 21, 1994, is in direct conflict with this Court's *Hawaiian Airlines, Inc. v. Finazzo* [sic – *Norris*] opinion, decided June 20, 1994?"

As set forth in this Brief, this case in fact presents no issue meriting Supreme Court review.

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Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT WILLIAM M. BANTA IN OPPOSITION

This case, which was decided upon *two* independently sufficient grounds, presents no issue of national importance, represents no conflict among the circuits, and concerns matters which were either not raised below or which relate to matters of state law.

In seeking review, petitioner addresses only one of the two separate grounds upon which the Sixth Circuit affirmed the district court's decision, and ignores at least three separate additional state law grounds supporting the Court's holding. Because the question presented is not outcome determinative in this case, and because a decision of such little consequence simply does not merit

Supreme Court review, respondent William M. Banta ("Banta") respectfully requests that the Petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

The statement of the case contained in the Petition for Writ of Certiorari is substantially inaccurate and contains numerous misstatements and omissions of material facts. Pursuant to Rule 15.1, the correct statement of the case, based upon the evidence and pleadings introduced before the district court, is as follows:

A. The Parties

Petitioner Kenneth Henegar ("Henegar") was employed as a brakeman by the Norfolk and Western Railway Company. He was covered under a collective bargaining agreement between the United Transportation Union and the railroad. Banta was Henegar's supervisor.

B. The Collective Bargaining Agreement

The company's safety rules, promulgated pursuant to the collective bargaining agreement, required that employees sustaining personal injuries report them promptly to their immediate supervisors. Those same work rules obligated supervisors to report the facts through the appropriate company channels. The agreement also required a formal hearing before the imposition of discipline and further required, pursuant to the Railway Labor Act, 45 U.S.C. Sections 151 *et seq.* ("RLA"),

that any disputes be submitted to final and binding grievance arbitration.

C. Henegar Complains Of A Hernia

Henegar contended below that on February 4, 1991, he began to suffer stomach pains while working at a switching yard in Milan, Michigan. Henegar went to the hospital where, he claims, he was told that he had an umbilical hernia. The hospital records however, reflected that Henegar had been aware of the hernia for many months. Banta met Henegar at the hospital and drove him back to the rail yard. Banta later testified that Henegar told him in the car that he had long been aware that he had had a hernia requiring surgical repair, but was fearful of having an operation.

D. Henegar Claims That His Hernia Was Work-Related

Henegar filed an injury claim alleging that his hernia was work-related. On March 15, 1991, he gave a statement to a railroad claims agent in which he asserted that he had not known about his hernia before February 4.

E. Henegar Is Charged Under The Labor Agreement With Providing False And Conflicting Statements

Upon learning of Henegar's statements to the claims agent, Banta formally charged him under the collective bargaining agreement with having provided false and conflicting statements concerning his alleged injury. The

railroad scheduled a disciplinary hearing under the terms of the collective bargaining agreement to investigate the claim.

The Hearing Officer scheduled the hearing for March 28, 1991 in Michigan. Henegar's union local chairman represented him. During the hearing, Banta testified that Henegar had told him that he had been aware of the hernia for at least one year before February 4, and had been postponing surgery recommended by his physician. The railroad also introduced Henegar's hospital records, which similarly reflected that he had long been aware of the hernia.

F. The Hearing Officer Discharges Henegar And A Public Law Board Affirms That Decision

Presented with this evidence, the Hearing Officer concluded that Henegar had provided false and conflicting statements concerning his alleged injury. More specifically, the Hearing Officer found that Henegar's claim that he had suffered a personal injury at work was inconsistent with the hospital records and his statements to Banta in the car, both of which indicated that the injury did not occur at work. Based upon that finding, the Hearing Officer dismissed Henegar from service.

Henegar, through his Union, appealed that decision to a Public Law Board. On October 11, 1991, after reviewing the hospital records and transcript of the hearing, the Public Law Board affirmed the decision dismissing Henegar.

G. Henegar Brings Suit For Slander

Henegar brought suit against Banta on March 13, 1992. In the Complaint and Amended Complaint, Henegar rested his claim solely upon testimony at the hearing itself and referred only to slander rather than libel.

The District Court granted summary judgment in Banta's favor on the grounds that the claim was pre-empted under the RLA. In reaching that conclusion, the District Court employed the same test "used by the Supreme Court in cases under § 301 of the Labor Management Relations Act." Appendix B-5, citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985).

The Sixth Circuit affirmed. It first concluded that the claims were preempted under the RLA. The Court also found, as a separate, independently sufficient ground, that the claims would also have been preempted under this Court's test for Section 301 cases, citing *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988).

REASONS FOR DENYING THE WRIT

Petitioner posits an issue before this Court which addresses only one of two alternative holdings. Moreover, the Court below not only affirmed the District Court's decision based upon two separate grounds, but at least three *additional* independent grounds under state law would also have dictated in the same result. Further, because the District Court and the Sixth Circuit have

already considered this case under the standard petitioner advocates, there is no good reason for yet another review.

A. The Issue For Which Review Is Sought Is Not Dispositive Because The Claims Were Found To Be Preempted Under *Lingle* And The RLA

The RLA requires the submission of any disputes between carriers and their employees "growing out of grievances or out of the interpretation or application of [collective bargaining agreements]" to special resolution mechanisms. 45 U.S.C. § 153 First (i). As interpreted by this Court, the Act's grievance mechanisms are "a mandatory, exclusive and comprehensive system for resolving grievance disputes." *Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co.*, 373 U.S. 33, 38 (1963).

Employee grievances growing out of the interpretation or application of collective bargaining agreements are termed "minor disputes" under the RLA. *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972); *Consolidated Rail Corp. v. Railway Labor Exec. Ass'n*, 491 U.S. 299, 302-03 (1989). The resolution of minor disputes is within the exclusive jurisdiction of the National Railroad Adjustment Board ("NRAB") and of public law boards. *See Andrews*, 406 U.S. at 325; *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89 (1978); 45 U.S.C. § 153 Second. The RLA's policy of channeling dispute resolution to either the NRAB or the public law boards is to prevent "[t]he exercise of state power over an area of activity specifically relegated to the railway act dispute resolution

process." *McCall v. Chesapeake & Ohio Railway Co.*, 844 F.2d 294, 301-02 (6th Cir.), *cert. denied*, 488 U.S. 879 (1988).

The RLA preempts state law claims arising out of minor disputes, no matter how characterized. *Andrews*, 406 U.S. at 323-24. Courts have viewed attempts to disguise minor disputes as state law claims as "end runs around the Railway Labor Act's policy of channeling employment disputes to arbitration." *Leu v. Norfolk & Western Railway Co.*, 820 F.2d 825, 831 (7th Cir. 1987). If an employee's purported state law claim is in reality a minor dispute or an attempt to circumvent the Act's mandatory procedures, it is preempted by the RLA and must be dismissed. *Andrews*, 406 U.S. at 323-24. The RLA's mechanisms, prescribed not by contract but by statute, preempt a wide variety of employment related claims.

In both *Lueck* and *Lingle*, the Court recognized that where an employee's claim requires reference to the terms of the collective bargaining agreement, it is preempted by federal law. *Lingle*, 486 U.S. at 405-06; *Lueck*, 471 U.S. at 220; *see also, IBEW v. Hechler*, 481 U.S. 851, 861-62 (1987) (Section 301 preempts tort claim requiring reference to the collective bargaining agreement to determine the appropriate duty of care). In this case, as both lower courts found, Henegar's claim was not independent of the labor agreement, did in fact require reference to the terms of that agreement, and was therefore preempted under that standard.

1. The Accusation Was One Under The Collective Bargaining Agreement

At the outset, the alleged slander consisted of an accusation of providing false and conflicting statements under work rules promulgated pursuant to the collective bargaining agreement. Both the reasonableness and truthfulness of Banta's statements must be measured against the collective bargaining agreement and its terms. The hearing itself, where the alleged slander occurred, was required by the labor contract and the hearing's procedures were spelled out in its provisions. This claim has a firm contractual nexus.

2. The Contract Would Have To Be Examined To Determine The Existence Of A Prima Facie Case Of Slander

More importantly, as the Sixth Circuit found, a prima facie case of slander under Michigan law requires that the plaintiff prove the existence of an "unprivileged publication." *New Franklin Enterprises v. Sabo*, 192 Mich. App. 219, 480 N.W.2d 326, 328 (1991). To determine whether Banta's statements at the hearing were "unprivileged," a finder of fact would have to look to the terms of the collective bargaining agreement to consider the circumstances under which the statements were made.

In this case, of course, the hearing itself was mandated not only by the RLA, but by the very terms of the collective bargaining agreement. Moreover, the challenging of eyewitnesses' testimony as slanderous is clearly a collateral attack on the minor dispute mechanisms and on the adverse judgment of the public law board. The same

collective bargaining agreement obligated the railroad to provide witnesses, such as Banta, to testify regarding Henegar's conduct giving rise to the violation. To establish a prima facie case of slander against Banta under Michigan law, therefore, Henegar had to introduce evidence of the terms of the collective bargaining agreement. *See also Lueck*, 471 U.S. at 218 n.12 (bad faith claim preempted because it required analysis of how benefit claims were handled under the contract).

3. The Evaluation Of Banta's Defenses Required Reference To The Contract

Banta's potential defenses also required reference to the terms of the collective bargaining agreement. First, to consider a defense based upon an absolute privilege under Michigan law, the Court would have to review the terms of the collective bargaining agreement to determine Banta's interest in testifying, as well as the circumstances under which he was testifying. Indeed, Banta asserted defenses based upon absolute and qualified privileges, both of which would require an examination of the circumstances under which the statements were made and, therefore, also the terms of the collective bargaining agreement as they related to the hearing itself.

Banta also asserted defenses based upon collateral estoppel under Michigan law. This defense again would require reference to the collective bargaining agreement to determine the circumstances under which the Public Law Board found against Henegar, and whether its finding as to the truthfulness of Banta's statements would be given issue-preclusive effect. Since the underlying claim,

Henegar's prima facie case, and consideration of Banta's many defenses under state law all required reference to the terms of the collective bargaining agreement, *Lingle* dictated the conclusion, as the Sixth Circuit found, that Henegar's claims were preempted.

B. Three Separate State Grounds Existed To Affirm The Court's Holding

In addition to the straightforward application of *Lingle*, three separate state law grounds existed for the affirmance of the decision below.

1. Any Claims Based Upon Prehearing Statements Would Be Time-Barred Under State Law

At the outset, in an effort to persuade this Court to accept review, Henegar has attempted to broaden his Complaint beyond its scope to assert that Henegar somehow defamed him in a written notice *before* the arbitration hearing. No such allegation, however, was made in the Complaint or Amended Complaint, which referred only to slander, not libel.

Of equal importance, any such claim would have been barred by the state statute of limitations. The alleged prehearing statements were made in February, 1991. This action was not filed until March 13, 1992, and any such statements were made more than one year prior to the filing of suit. Under the laws of Michigan, where the alleged slander occurred, and Ohio, where this case was filed, the statute of limitations for a claim of libel or slander is only one year. *See* Mich. Comp. Laws

§ 600.5805(7)) (Mich. Stat. Ann. § 27A.5805(7)); Ohio Rev. Code § 2305.11(A). In both states, the limitations period begins to run at the time of publication. *Hawkins v. Justin*, 109 Mich. App. 743, 311 N.W.2d 465 (1981); *Guccione v. Hustler*, 64 Ohio Misc. 59, 413 N.E.2d 860 (1978). Any attempt, therefore, to broaden this case beyond the hearing, apart from being outside of the scope of the Complaint, would be time-barred.

2. Henegar's Claims Were Barred By An Absolute Privilege Under State Law

Henegar's claims were also barred under Michigan law because the statements made at the hearing were absolutely privileged. *Fulghum v. United Parcel Service, Inc.*, 424 Mich. 89, 378 N.W.2d 472, 477 (1985) (Levin, J., concurring) (statements made during grievance proceedings are absolutely privileged); *Mendicki v. General Motors Corp.*, 367 F.2d 66 (10th Cir. 1966) (same).

3. Henegar's Claims Were Barred By The Doctrine Of Collateral Estoppel Under State Law

Further, the claims were barred, under Michigan law, by the doctrine of collateral estoppel since the Public Law Board concluded, after an evidentiary hearing, that Henegar had, in fact, provided false statements to the railroad. *See Fulghum v. United Parcel Service, Inc.*, 130 Mich. App. 375, 243 N.W.2d 559 (1983) (decision of arbitration hearing has collateral estoppel effect) *aff'd*, 424 Mich. 89, 378 N.W.2d 472 (1985); *Corey v. New York Stock*

Exchange, 493 F. Supp. 51, 56-57 (W.D. Mich. 1980) (decision in securities arbitration must be given collateral estoppel effect in subsequent defamation action), *aff'd*, 691 F.2d 1205, 1213 (6th Cir. 1982) (characterizing such a claim as "an impermissible collateral attack"). Since there was one alternative federal ground for the Sixth Circuit's holding and three separate state grounds, there is no need for Supreme Court review.

C. The Application Of *Lingle* To This Dispute Would Not Change The Outcome

Although Henegar makes much of this Court's opinion in *Hawaiian Airlines, Inc. v. Norris*, 114 S. Ct. 2239 (1994), that decision contributes little to this controversy. The Sixth Circuit has already received briefs, has considered, and has decided this case under the standard dictated by that opinion and by *Lingle*. The District Court decided the case under the standard articulated in *Lueck*.

Moreover, nothing in *Hawaiian Airlines* touches upon the other independently sufficient grounds raised by Banta below, including the application of the state law statute of limitations, the existence of a state law absolute privilege, and the assertion of collateral estoppel under Michigan law. Similarly, the sole other federal appellate court since *Lingle* deciding the issue raised in this case, the preemption of a defamation claim arising from statements made during the course of a grievance procedure, reached precisely the same conclusion. *See Shane v. Greyhound Lines*, 868 F.2d 1057, 1063 (9th Cir. 1989).

CONCLUSION

This case does not merit Supreme Court review. The decision in *Hawaiian Airlines* only addresses which of two standards apply, the one articulated for Section 301 cases or the one used by some lower courts under the RLA. The District Court decided the case under the Section 301 standard set forth by this Court in *Lueck*. The Sixth Circuit decided the matter under both standards, and concluded that the case satisfied neither. Since neither standard was satisfied, and since this case was fully briefed, argued, thoughtfully considered, and decided by the Court of Appeals, there is no reason for further review.

For all of these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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